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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

NO. [redacted] 159

R. R.
Appellant

VS

THE STATE OF TEXAS
Appellee

ON APPEAL FROM THE COURT OF CIVIL APPEALS
FOR THE FOURTH SUPREME JUDICIAL DISTRICT
OF TEXAS

JURISDICTIONAL STATEMENT

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IN THE

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OCTOBER TERM, 1969

R. R.
Appellant

VS

THE STATE OF TEXAS
Appellee

JURISDICTIONAL STATEMENT

Appellant, Rudy Rios, now sixteen years of age, and fifteen years of age at the time of his trial, appeals from the judgment of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, entered November 19, 1969, rehearing denied December 17, 1969; discretionary review by the Supreme Court of Texas denied February 18, 1970. These actions affirmed the judgment of the 150th District Court of Bexar County, Texas (Sitting as the Juvenile Court). Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal, and that a substantial question is involved.

Opinions Below

The opinion of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, hereinafter referred to as either the Court of Civil Appeals or the Court below, has not yet been officially reported, but will appear at ——— S.W. 2d———, and is set out *infra* at pages 19-22. The Court of Civil Appeals for the

Fourth Supreme Judicial District of Texas wrote no opinion in denying the motion for rehearing, but its endorsement on the face of Appellant's Motion for Rehearing overruling same is set forth at page 35, *infra*. The Supreme Court of Texas wrote no opinion in denying discretionary review, but its order is found at page 36, *infra*. The 150th District Court, sitting as the Juvenile Court, wrote no opinion but its judgment is found at page 38, *infra*. The Court of Civil Appeals, in disposing of two of Appellant's contentions, referred to *Smith v. State*, 444 S.W. 2d 941 (Tex. Civ. App., 1969), which involved a similar problem, instead of writing specifically on Appellant's case. For this reason, the opinion in *Smith v. State, supra*, is set forth for the Court at pages 23-34, *infra*.

Jurisdiction

(i) The Criminal District Attorney of Bexar County, Texas, brought this action to adjudicate Appellant to be a delinquent child under Article 2338-1, Vernon's Annotated Texas Statutes, alleging Appellant to be a delinquent child as defined in Section 3(b) of Article 2338-1, Vernon's Annotated Texas Statutes, in that he committed an act, which if committed by an adult, would have been the crime of malicious mischief. The 150th District Court, Sitting as the Juvenile Court, entered judgment on May 19, 1969, finding Appellant to be a delinquent child, and ordering him committed to the Texas Youth Council for placement at the Gatesville State School for Boys, Gatesville, Texas, for an indeterminate period of time not to exceed Appellant's twenty-first birthday.

(ii) Appellant duly appealed to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, and that Court affirmed the decision of the Juvenile Court on November 19, 1969. A timely application for rehearing was denied on December 17, 1969.

Appellant then applied for Writ of Error to the Supreme Court of Texas asking for discretionary review, but that Court refused the Writ, "no reversible error" on February 18, 1970. Under Texas law the judgment of the Court of Civil Appeals then became the final judgment of the highest Court of the State available to Appellant. Appellant filed Notice of Appeal to the Supreme Court of the United States on May 4, 1970, in the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

(iii) The jurisdiction of this Court to review by appeal the judgment of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas is conferred by 28 U.S.C. 1257(2).

(iv) Cases which sustain the jurisdiction of this Court are:

(a) On the judgment of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas being a final judgment of the highest Court of the State when the Supreme Court of Texas declines discretionary review by refusing the Writ of Error, "no reversible error": *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954); *Bacon v. Texas*, 163 U.S. 207 (1896).

(b) Other cases sustaining the jurisdiction of this Court are: *Lake Erie and W. Ry. v. State*, 249 U.S. 422 (1920); *Connecticut General Life Insurance Co. c. Johnson*, 303 U.S. 77 (1938); and *Doty v. Love*, 295 U.S. 64 (1935).

(v) Appellant attacks the validity of a portion of the State statute, contending it is unconstitutional either on its face or as construed and applied. The portion under attack is Section 13(c)(2), Vernon's Annotated Texas Statutes, as amended by Acts 1965, 59th Leg., page 1256, Ch. 577, Section 5, effective August 30, 1965; Acts 1967, 60th Leg., page 1085, Ch. 475, Section 6, effective August 28, 1967. The applicable portions of Section 13 read as follows:

Sec. 13 (c) If the judge or jury finds that the child is delin-

quent, or otherwise within the provisions of this Act, the court may by order duly entered proceed as follows:

* * * * *

(2) commit the child to a suitable public institution or agency or to a suitable private institution or agency authorized to care for children or place the child in a suitable family home or parental home for an indeterminate period of time, not extending beyond the time the child shall reach the age of twenty-one years.

Question Presented

Whether Article 2338-1, Section 13(c)(2), Vernon's Annotated Texas Statutes on its face or as construed and applied, is invalid under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, and the Eighth Amendment to the United States Constitution, insofar as said section authorizes confinement of a juvenile for a greater period of time than an adult for the same offense.

Statute Involved

Section 13(c)(2), Article 2338-1, Vernon's Annotated Texas Statutes; set forth *verbatim* at page 4, *supra*. For the convenience of the Court, the entire text of Article 2338-1, Vernon's Annotated Texas Statutes, is set forth at pages 40 through 63, *infra*.

Statement of the Case

I. When and How the Federal Questions Were Raised and Decided Below.

The question here at issue was first raised in Appellant's brief in the Court of Civil Appeals for the Fourth Supreme Judicial Dis-

trict of Texas. At that point, Appellant contended that such a commitment violated the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, and also his right to be free from cruel and unusual punishments as guaranteed by the Eighth Amendment to the United States Constitution. The Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, considered and rejected Appellant's contentions. Appellant preserved the point in his Motion for Rehearing in the Court of Civil Appeals, which was denied. In his Application for Writ of Error to the Supreme Court of Texas, Appellant again raised this point but the Court denied discretionary review.

II. Facts

Appellant came before the Juvenile Court of Bexar County, Texas, just before his sixteenth birthday, by means of a petition filed by the Criminal District Attorney of Bexar County, Texas, alleging that he willfully destroyed one automobile window under the value of $50.00, the same being the property of another, and without the consent of the owner, by throwing an unknown object through the automobile window. This offense is known in Texas as malicious mischief. Testimony at the trial established that Appellant caused the damage by throwing a rock through the vent window of the automobile, and that the damage cost $7.88 to repair. See opinion of the Court below page 19, *supra*. Malicious mischief is punishable under Article 1350, Vernon's Annotated Penal Code, which reads as follows:

> Article 1350. Injury or destruction of property of any kind belonging to another.
>
> (1) (a) It shall be unlawful for any person to willfully injure or destroy, or attempt to injure or destroy, any property

belonging to another, of any kind whatsoever, without the consent of the owner and lien holder, if any, thereon.

* * * *

3. Whoever shall violate the provisions of subdivision I hereof shall be punished as follows:

* * * *

(b) When the value of the property destroyed or the extent of the injury inflicted is under the value of Fifty ($50.00) Dollars, he shall be fined not exceeding One Thousand ($1,000.00) Dollars or be confined in the County Jail for not more than one (1) year, or be both fined and imprisoned.

Appellant was tried before the Court, without demanding a jury, and the Court found that the child had committed the act, and after a dispositional hearing, ordered that the child be committed to the Texas Youth Council, for placement at the Gatesville State School for Boys, for an indeterminate period of time not to exceed his twenty-first birthday. This trial was held on the 19th of May, 1969, and Appellant was transported to the Gatesville State School for Boys, Gatesville, Texas, a few days thereafter, where, at the time of the preparation of this Jurisdictional Statement, he remains.

The Question Is Substantial

This case presents the substantial constitutional question of whether a state statute can deprive a juvenile of his liberty for a maximum of five years for behavior punishable for an adult by not more than one year's confinement. Appellant contends that there is no logical reason for a classification which imprisons one group five (or if the child were of minimum juvenile court page, eleven)

times as long as the other group, solely upon the basis that one group is adult and the other juvenile.

The irony of such a great disparity in the results of illegal behavior for children and adults was dwelt upon throughout this Court's opinions in *Matter of Application of Gault*, 387 U.S. 1 (1967), but was not ruled upon because it was not raised.

The portion of the Juvenile Act under attack, Section 13(c)(2), Vernon's Annotated Texas Statutes, requires that if the child is committed to the Texas Youth Council that his commitment shall be for an indeterminate period of time not to exceed his twenty-first birthday. See also *Smith v. State*, *supra*, 444 S.W. 2d at 942, n.2, *infra* at page 24. Once committed to the Texas Youth Council the Juvenile Court loses jurisdiction. Section 14, Article 2338-1, Vernon's Annotated Texas Statutes.

In view of the fact that most, if not all state jurisdictions in the United States have provisions similar to Texas, the number of children under open-ended commitments running several years in excess of the maximum terms for adults must be legion. *Smith v. Texas*, *supra* 444 S.W. 2d at 942, *infra* at page 24.

If Appellant is correct in his contention that his confinement beyond one year is unconstitutional, then thousands of children in this country are likewise illegally imprisoned. In view of the great numbers of individuals and great disparity in confinement involved, Appellant truly presents a Constitutional question of substantial magnitude, and this Court should note jurisdiction in this case.

Section 13(c)(2), Article 2338-1. Vernon's Annotated Texas Statutes Violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution in Authorizing Longer Confinement for Juvenile Than for Adults.

Appellant will have been confined by the Texas Youth Council for one year on May 19, 1970. Under the judgment of the committing court, the Bexar County Juvenile Court, Appellant could be and probably will be confined until he is twenty-one years of age, a period of five years. If he had been seventeen years of age when tried, Appellant could not have been jailed in excess of one year. Appellant contends that such a disparity of punishment, the sole basis for which is the tender age of Appellant, is violative of his right to Due Process and Equal Protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution, and his right to be free from the infliction of cruel and unusual punishments as guaranteed by the Eighth Amendment to the United States Constitution.

Appellant therefore contends that inasmuch as he was charged with malicious mischief under $50.00, classed as a misdemeanor and punishable by a fine not to exceed $1,000.00, or by imprisonment in jail not to exceed one year, or both, under Article 1350, Vernon's Annotated Penal Code, that the judgment committing him to the Texas Youth Council is void insofar as it entails a loss of liberty of over one year, and that this Court should declare Section 13(c)(2), Article 2338-1, Vernon's Annotated Texas Statutes unconstitutional insofar as it authorizes confinement for over the maximum time fixed by the Penal Code for an adult offender. Appellant further alleges that such a disparity cannot be justified by a relation to any compelling need of the state, society, or the juvenile, but is fundamentally unfair, and an arbitrary and invidious discrimination against him.

In sentencing Appellant to an indeterminate period of time not to exceed his twenty-first birthday, the Juvenile Court was acting under Section 13(c)(2), Article 2338-1, Vernon's Annotated Texas

Statutes. Section 13(c)(2), reads:

> ***(c) If the judge or jury finds that the child is delinquent, or otherwise within the provisions of this Act, the Court may by order duly entered proceed as follows:
>
> * * * *
>
> (2) commit the child to a suitable public institution or agency or to a suitable private institution or agency authorized to care for children; or place the child in a suitable family home or parental home for an indeterminate period of time, not extending beyond the time the child shall reach the age of twenty-one years.
>
> * * * *

In a related case, *Smith v. Texas, supra,* the Court below held this language to mean that a child committed to the State School must be committed for an indeterminate period of time not to exceed his twenty-first birthday. 444 S.W. 2d at 942, *infra* at page 24. It is submitted that it makes absolutely no difference that at the pleasure of the Texas Youth Council, the child can be discharged before that date; the fact is that they have not done so, and by the time this Jurisdictional Statement is filed Appellant will have served the maximum time allowed by the Texas Penal Code.

It is patently obvious that there is a great disparity in the loss of liberty faced by Appellant and that faced by a mature adult. It is true that a state may create classes within its citizens, and treat the classes differently. The state may "reasonably" classify in promoting its citizens' safety and welfare, and may heed experience which marks a class or type of offense which reasonably requires special treatment. *United States ex rel. Robinson v. York,* 281 F. Sup. 8 (U.S.D.C. Conn., 1968; *Skinner v. Oklahoma,* 316 U.S. 535 (1942). However, as will be explained below, the severity of the regulation

or restraint creates a proportionally greater need for the classification to be reasonable, effective and urgent. Thus *Muller v. Oregon*, 208 U.S. 412 (1908) upheld a statute limiting women's working hours but not men's, on grounds of biological differences in structure and strength; *Goesaert v. Cleary*, 335 U.S. 464 (1948) upheld a Michigan statute limiting female bartenders because of supposed dangers to morals; *Hoyt v. Florida*, 368 U.S. 57 (1961), approved a statute preventing involuntary jury service for women, on grounds they had responsibilities at home. As stated in *Gulf, C. & S. F. Ry v. Ellis*, 165 U.S. 150, 155 (1897), there are cases where there is "... some difference which (has) a reasonable and just relation to the act in respect to which the classification (was) proposed ..."

However, the Equal Protection Clause of the 14th Amendment commands that distinction drawn between persons or classes of persons by a state must not be irrelevant, arbitrary, or *invidious*. Due Process further requires that the distinction and the discrimination be fundamentally fair. The attempted classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is purposed. Such legislation and Court action pursuant to it must have a reasonable relation to legitimate ends and must be supported by considerations of policy and practical convenience. *Gulf, Colorado, and Santa Fe v. Ellis*, 165 U.S. 150 (1897).

In the case of *Loving v. Commonwealth of Virginia*, 388 U.S. 1, (1967) Virginia's miscegenation statutes were struck down as being violative of the Equal Protection Clause of the 14th Amendment. This Court stated:

> The equal protection clause requires the consideration of whether the classification drawn by any statute constitutes an arbitrary and invidious discrimination. 388 U.S. at page 10.

The question of what constitutes invidious discrimination was answered by this Court in *Skinner v. State of Oklahoma, supra.* A state statute which provided for sterilization of certain habitual offenders and not others was struck down as violating the equal protection clause. The Court said:

> The guaranty of "equal protection of the law" is a pledge of protection of equal laws. When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. 316 U.S. at page 541.

The statute provided for sterilization of those who committed grand larceny three times, but excepted embezzlers. The Court pointed out that these were intrinsically the same quality of offense, and struck down the statute. Appellant can see little difference between this case and his own case. In fact, Appellant's case would seem to lend itself even better to the decision of the Court in *Skinner*, for Appellant committed exactly the same offense as an adult offender.

In *United States ex rel. Robinson v. York, supra,* a District Court was confronted with an Equal Protection attack on a Connecticut statute authorizing a trial judge in certain misdemeanor cases to commit women to a state farm or reformatory for an indeterminate period in excess of the regular criminal penalty. There was not a similar provision for men. The state claimed it was doing the woman a favor because the farm was "nice" and attempts were made to rehabilitate, rather than punish. The classification was found to be arbitrary and invidious. The contention that the excessive confinement was reasonable because of the rehabilitative aspects was disposed of thusly.

> The state seeks to justify Sec. 17-360 by noting that it is one among a number of provisions in that title of the General Statutes dealing with "Humane and Reformatory Agencies and Institutions" as distinguished from the "Penal Institutions" authorized in Title 18, and that it is, therefore, "part of the integral whole which constitutes the State's attempt to provide women and juveniles a special protection and every reformative and rehabilitative opportunity." . . . This purports to be a way of concealing the abrasive nature of imprisonment under the charming nature of an educational institution. But this should not blind one to the fact that the institution is still a place of imprisonment. (Citing *In re Gault, supra*, 387 U.S. at 27).
>
> * * * *
>
> Even assuming, as the state alleges, that there is a difference in the quality of treatment and conditions of incarceration at the Farm, those facts are not enough to justify a longer period of imprisonment for adult women as opposed to men . . . But if it matters what kind of facilities are provided, it matters even more that there shall be no invidious discrimination with repect to the length of imprisonment. 281 F. Supp. at 14 and 15.

Another judge in the same district followed the *York* case with *United States ex rel. Sumrell v. York*, 288 F. Supp. 955 (U.S.D.C., Conn. 1968) wherein it held that the holding in the York case was not changed by the fact that Sumrell was a minor girl. The Court granted probable cause for appeal in both cases, but the State took no appeal. It is hard to imagine a fact situation more similar to the case at bar, out of the strictly juvenile area. They only ascert-

ainable difference is that *York* and *Sumrell* dealt with man and woman, and this case deals with child and adult.

From the above cases it is seen that under Federal law, any distinction made between classes must have a valid basis in law. Therefore, if the judgment in question is to be upheld it must be demonstrated that it is not only not arbitrary or invidious, but that it has reference to the comfort, the safety, or welfare of society. The purpose must be lawful: the means rational. Appellant submits that there may be a valid basis for treating juveniles differently from adult offenders, but such treatment is only justified when the juvenile is treated more gently and with greater solicitude than is the adult offender. The original motivation behind the passage of all juvenile acts was to protect the interests of the children, and relieve them from the harshness of the criminal law. The only basis advanced to justify the difference in the treatment of a juvenile and an adult is that the adult is sent to a prison, but child is sent to a "school" to rehabilitate him. The fallacy of this argument was aptly pointed out by this Court in *Matter of Application of Gault, supra.*

The question in any equal protection case, of course, is whether the classification is "rational" and not "arbitrary". This Court, however, has articulated at least two standards to be applied by the Courts assessing "rationality", the "traditional standard", and the "strict scrutiny standard". The "traditional standard" applies in the area of business regulation, such as the *Muller v. Oregon* case, *supra.* When such a classification is called into question, if "any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts must be assumed." *Morey v. Doud*, 375 U.S. 457, 463-464 (1967). In other words, the plaintiff must carry a large burden in proving that such facts do *not exist*. Appellant doubts that Section 13(c)(2),

Article 2338-1, Vernon's Annotated Texas Statutes, could be justified even under the traditional standard.

However, Appellant contends that the state's action in this case should be subject to strict scrutiny. This Court has "long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be scrutinized and carefully confined". *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1967); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). A list of those fundamental rights whose infringement calls forth careful attention of course would encompass those explicitly guaranteed by the first eight amendments. See, e.g., *Baxtrom v. Herald*, 383 U.S. 107 (1966) (jury trial); *Cox v. Louisiana*, 379 U.S. 536 (1965) (speech and assembly); *Carrington v. Rath*, 380 U.S. 89 (1965) (voting); and, most recently, *Shapiro v. Thompson*, 394 U.S. 618 (1969) (travel). Where such a constitutional right is restrained by the classification, "its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest", *Shapiro v. Thmpson, supra*, 394 U.S. at 634. (emphasis in the original).

The "close scrutiny" standard, however, is clearly not even confined to those classifications infringing express constitutional rights. Nor is it confined to those classifications involving "suspect" criteria such as race (cf. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

"Fundamental rights" include those rights basic to survival and human well-being, whether constitutionally articulated or not. Thus, in one of the early landmark cases in this area, *Skinner v. Oklahoma, supra*, this Court gave "strict scrutiny" to a classification adversely affecting certain persons' right to procreate (nowhere

guaranteed in the Constitution — but obviously a fundamental human concern).

This judicial approach to classifications affecting fundamental personal interests and rights was recently reaffirmed by this Court in *Levy v. Louisiana*, 391 U.S. 68 (1968).

The "Pursuit of Liberty" being the most basic right open to Americans, after life itself, it certainly follows that where the equal protection problem involves a disparity of one and five years incarceration, that a state's power to work such a discrimination, should be subjected to the strictest scrutiny, and the disparity or discrimination should not be allowed unless a *compelling* need is shown, and the means are clearly and most reasonably related to the need. Appellant's need and right to liberty, to breathe free air is much more basic than issues of racial discrimination, right to procreate, travel, speak, etc. Therefore, Appellant is not required to demonstrate that there is no factual situation in which the classification would be reasonable; on the contrary, the State must show a compelling need for the classification, and a clear relation of the classification to the satisfaction of that need.

The most logical argument to support such a disparity would probably be that the child is not being punished, but "rehabilitated". We submit that even so, there are limits to rehabilitation, and that beyond a point, rehabilitation is just an euphemism for imprisonment. As will be developed in another part of this brief, the punishment must fit the crime; we submit that the rehabiiltation, or the cure, must fit the disease. If one year is sufficient time to show an adult the error of his ways, it should certainly also be sufficient for a child.

Section 13(c)(2), Article 2338-1, Vernon's Annotated Texas Statutes Violates Appellant's Right to be Free from Cruel and Unusual Punishment.

State prisoners have a constitutional right to be free from the infliction of cruel and unusual punishment. *Robinson v. State of California*, 370 U.S. 660 (1962).

It is undoubtedly the general rule that a sentence which is within the limitations as fixed by the statute under which the defendant is sentenced is not "cruel and unusual" within the contemplation of the Eighth Amendment. However, it is equally well-settled that if the sentence prescribed by the statute itself is cruel and unusual, the statute is unconstitutional and any sentence imposed thereunder must be set aside as void. *Gallego v. U.S.* 276 F. 2d 914 (1960), citing *Weems v. United States*, 217 U.S. 349 (1910); see also *Ramirez v. U.S.*, 294 F. 2d 277 (1961).

The case of *Weems v. U.S., supra*, is the leading case on this point. This Court held that long imprisonment could be "so disproportionate as to constitute a cruel and unusual punishment". 217 U.S. at 352. The Court went on to indicate that punishment for crime should be graduated or proportioned to the offense if it not to become "cruel or unusual".

Appellant does not dispute the fact that many of the early cases on this point were concerned with cruelties that amounted to actual physical torture, and at first blush there seems to be little similarity in degree to those punishments and the one with which this appeal is concerned. However, as the cases point out, times have changed. And the sensibilities of the citizens of this country have, hopefully, become more easily shocked. At one time chain-gangs were common-place and the sight or thought of such punishment shocked no one's conscience. But as

we say times have changed, and what might have been deemed not cruel or unusual in 1700 or in 1800 or in 1910 will not be necessarily viewed in the same light today.

However, the law was settled in the *Weems Case* that a punishment which is not proportionate to the offense committed is cruel and unusual and in violation of the Eighth Amendment to the United States Constitution. This much cannot be disputed, and the only question remaining is the question of who or what is to determine whether the punishment is disproportionate. Ordinarily, the legislature has that authority, but in the instant case it seems rather evident that where the legislature had decided that an adult should receive a maximum of one year in jail for the offense committed in this case, that such a term is the "reasonable and usual" punishment which the offense committed merits. Therefore, it would seem equally obvious that a sentence which is five times greater than the "usual" punishment is indeed "unusual" — and cruel. Appellant respectfully submits that he has, in fact, received a sentence which is five times as great as the "usual" punishment as set by the legislature in reference to adult offenders. Appellant further submits that such a sentence is "unusual" within the full meaning of the Eighth Amendment. Further, Appellant contends that in view of his tender age and his greater need for an uninterrupted home life during his formative years, that this "unusual" punishment is excessively cruel.

After so much discussion of how states and courts unwittingly give the juvenile the worst, rather than the best of both worlds, civil and criminal, it is refreshing to be able to cite *Workman v. Commonwealth of Kentucky*, 429 S.W. 2d 374 (Ct of App., Ken. 1968). In this case the Highest Court in Kentucky decided to actually give the juveniles a break, and held that so much of the rape convictions of two 14 year old youths as required them to

serve life sentences without coming eligible for parole was reversed and they were to become eligible for parole with other lifers. The children reached such a sentence after being legally tried as adults for rape, and the non-availability provisions were provided by statute in rape cases. But the Court felt that incorrigibility is inconsistent with youth.

A reading of the *Workman* case indicates that his was a particularly repulsive and brutal crime, and yet we agree with the Kentucky Court that it shocks the conscience to doom fourteen year-old boys to life in prison without benefit of parole. However, it is not as shocking to the conscience as the fact that Appellant in the case at bar is not to be held to the same standard as the hardened criminal, which the Kentucky Court found unbearable, but is to be "rehabilitated" by restraining him of his liberty for five times longer than the hardened adult criminal.

CONCLUSION

For the reasons stated above, jurisdiction should be noted.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT BELOW

R : R
Appellant

No. 14819, v.

The State of Texas,
Appellee.

Appeal from Bexar County.

Appellant, a boy aged sixteen, was adjudged a delinquent child and, as authorized by applicable statutes,[1] has been committed to the State training school for boys for an indefinite term not extending beyond the period of his minority. Since he faces confinement for a period in excess of five years for hurling an object through the windshield of an automobile belonging to another, causing damage in the amount of $7.88, and since an adult guilty of the same act could not, under the provisions of Article 1350, Tex. Rev. P.C. Ann., be confined for a period of more than one year, appellant asserts that he has been deprived of his liberty without due process of law, that he has been denied the equal protection of the laws, and that he has been subjected to cruel and unusual punishment.

Since all of appellant's objections to the validity of our juvenile scheme, other than the contention relating to cruel and un-

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1. Article 2338-1, Sec. 13 (c); Article 5143d, Section 12, 31. Both references are to Tex. Rev. Civ. Stat. Ann.

2. In Robinson v. California, 370 U. S. 660 (1962), the United States Supreme Court regarded as established that the Fourteenth Amendment made the Eighth Amendment applicable to the states.

usual punishment, were considered at length by this Court and rejected in *Smith v. State*, 444 S.W. 2d 941 (1969) application for writ of error pending), we shall limit ourselves to a consideration of the question of cruel and unusual punishment.

Both the Eighth Amendment to the Constitution of the United States and Article I, Section 13 of the Texas Constitution prohibit, in identical language, the requirement of excessive bail, the imposition of excessive fines, and the infliction of cruel and unusual punishment.[2]

For the purposes of this opinion, we assume that, as appellant contends, a penalty may run afoul of the constitutional prohibition if it is excessive and that, implicit in this principle is the notion that the prohibition against cruel and unusual punishment requires that punishment should be proportioned to the crime.[3]

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3. There are indications that at the time the Eighth Amendment was adopted it was understood as prohibiting only the horrors of the Stuart period during which punishments such as pilorying, disemboweling, decapitation and drawing and quartering were not uncommon. See the dissenting opinion in Weems v. United States, 217 U. S. 349, 389-400 (1910). That is, many assumed that the prohibition was aimed only at cruel *methods* of punishment. During the nineteenth century we find expressions to the effect that the prohibition was obsolete as being aimed only at barbaric practices which had passed into oblivion. Hobbs v. State, 133 Ind. 404, 32 N. E. 1019, 1021 (1893).

It was seemingly accepted that only punishment which was both cruel and unusual was prohibited. Thus, although electrocution, when it was first introduced as a method of executing the death sentence, was "unusual" in the sense of being a novel method, it was held to be a reasonable method of inflicting capital punishment and not in itself violative of the constitutional interdiction. In re Kemmler, 136 U.S. 436 (1890). There is also authority to the effect that the purpose of the provision was the provision of "unnecessary" cruelty and pain. Wilkerson v. Utah, 99 U.S. 130, 136 (1878). But there is recent authority in support of the view that, even though the penalty involves no physical pain, it may be prohibited because of the method of punishment.

But even if we accept appellant's basic contention as true, they would be relevant only in cases involving punishment for crime. Appellant, relying heavily on the language in Kent v. United States,[4] and the general indictment of the juvenile court in In re Gault,[5] takes the position that the confinement of a delinquent child must be viewed as "punishment for the purpose

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In Trop v. Dulles, 356 U.S. 86 (1958), three members of the majority joined with Mr. Chief Justice Warren in an opinion which stated that deprivation of citizenship was cruel and unusual punishment for wartime desertion, classifying it as "a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the making."

Most of the nineteenth century decisions rejected the notion that excessive punishment by means of standard methods could be classified as cruel and unusual. These decisions are discussed in the dissenting opinion in Weems v. United States, *supra*, 217 U.S. at 401-409. Some courts held that no punishment within the limits authorized by the legislature could be considered cruel and unusual. Note, the Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment, 36 N. Y. U. L. Rev. 846, 852 n. 38 (1961). This reasoning was used by the Delaware court to support its conclusion that whipping is not a prohibited form of punishment. State v. Cannon, 190 A. 2d 514 (1963). Generally, only those sentences which were so excessive as to shock the moral sense of reasonable men ran the risk of judicial condemnation. See Fellman, The Defendant's Rights 207-208 (1958), for a representative list of sentences which have been sustained, or condemned, in the face of a claim of cruel and unusual punishment.

But at least one member of the Supreme Court during the last century believed that the Eighth Amendment prohibited excessive punishment. See the dissenting opinion of Mr. Justice Field in O'Neill v. Vermont, 144 U.S. 323, 340 (1892). Apparently, the first Supreme Court decision invalidating a penalty as unconstitutionally cruel and unusual is Weems v. United States, 217 U.S. 349 (1910). In Weems we also find the statement that it is a "precept of justice that punishment for crime should be graduated and proportioned to the offense."

See, generally, Note, 79 Harv. L. Rev. 635 (1966), from which most of the above summary was taken.

4. 383 U.S. 541 (1966).
5. 387U.S. 1 (1967).

of determining the child's rights under the Eighth Amendment even though the language of our juvenile statutes speaks in terms of treatment rather than punishment.

The record before us contains no evidence concerning the conditions at the state training schools or the facilities available at such institutions for the rehabilitation of youthful offenders. In the absence of evidence that the dismal picture painted in Gault reflects the conditions in the institutions of this State, and giving due consideration to the legislative declaration of policy and purpose, "we cannot condemn out of hand the Texas Youth Council, the juvenile judges and other trained people working in the field."[6]

The judgment of the trial court is affirmed.

CARLOS C. CADENA
Associate Justice

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6. State v. Santana, 444 S.W. 2d 614 (Tex. Sup. Ct., 1969). See also Smith v. State, 444 S.W. 2d 941, 947-948 (Tex. Civ. App.—San Antonio 1969, application for writ of error pending).

Opinion delivered and

filed November 19, 1969

OPINION OF THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS IN *SMITH V. STATE OF TEXAS*, 444 S.W. 2D 941.

Charles Dennis SMITH, Appellant,

v.

The STATE of Texas, Appelee.

No. 14737.

Court of Civil Appeals of Texas.

San Antonio.

July 30, 1969.

Rehearing Denied Sept. 17, 1969.

Harry B. Adams, III, John L. Sanders, Karl L. Rubinstein, San Antonio, for appellant.

James E. Barlow, Criminal Dist. Atty., Sparta Bitsis, Asst. Criminal Dist. Atty., San Antonio, for appeliee.

CADENA, Justice.

Appellant, a child adjudged delinquent and facing confinement in the State training school for boys for a period not extending beyond his twenty-first birthday — a period of almost five years — complains of the action of the district court denying his application for a writ of habeas corpus and ordering his return to the school. He argues that he faces confinement for a period of almost five years for carrying a switch-blade knife; that an adult who engaged in the same conduct could not be confined for a period in excess of one year and might escape with no more than the payment of a fine;[1]

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1. Vernons Ann.P.C. Art. 483 prescribes a punishment for adult violators of a fine not exceeding $500.00, or imprisonment for not more than one year, or both such fine and imprisonment.

and that this difference in the authorized period of confinement solely because of his tender years denies him the equal protection of the laws and deprives him of his liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

In Texas, as in perhaps all other states where confinement is deemed necessary in the case of a delinquent child, the child is committed to an institution for an indeterminate period not extending beyond his twenty-first birthday.[2] Stated simply, the authorized period of confinement depends solely on the age of the child — the younger the child, the longer the permitted period of detention. Such factors as the child's background, his previous history of antisocial conduct, his response to rehabilitative programs, if any, not involving confinment,[3] and the seriousness of the conduct, criminal

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2. Under the provisions of Vernon's Ann. Tex.Rev.Civ.Stat. Art. 2338-1, Sec. 13(c)(2), upon a finding of delinquency the court, if it determines that confinement is desirable, commits the child to "a suitable public institution or agency * * * for an indeterminate period of time, not extending beyond the time the child shall reach the age of twenty-one years." Under the provision of Sec. 12 of Art. 5143d (all references to statutes are, unless otherwise indicated, to Tex.Rev.Stat. Ann.) a child adjudged delinquent and not released, placed on probation, or placed in a private institution or agency, the court shall commit him to the Texas Youth Council. Every child commited to the Youth Council, if not previously discharged, shall be discharged from custody of the Youth Council when he reaches his twenty-first birthday. Art. 5143d, Sec. 31.

3. The alternatives to commitment to the Youth Council are placement of the child on probation or under supervision in his own home or in the custody of a relative or other fit person, upon such terms as the court shall determine; or commit the child to a suitable private institution or agency authorized to care for children; or place the child in a suitable family home; or make such other disposition as the court may deem to be for the best interest of the child. Art. 2338-1, Sec. 13(c). The Youth Council, upon

or otherwise,[4] upon which the finding of delinquency is based, are irrelevant in determining the length of the period during which he may be held.[5] Conceivably, a child of ten may be kept in an institution for eleven years for conduct which would subject an adult to no more than a fine or confinement for a few days or months.[6]

No citation of authority is required in support of the statement that a State may classify its citizens for various purposes, for to deny to government the power to classify is to divest it of the power to legislate intelligently. Since classification is a neces-

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receiving a delinquent child, is under the duty to examine the child and make an investigation of "all pertinent circumstances of his life and behavior." The Council may permit the child his liberty under supervision and upon such conditions as are believed conductive to acceptable behavior; or order his confinement under such conditions as are believed best designed for the child's welfare and the interests of the public; or order reconfinement or renewed releases as often as conditions indicate to be desirable; or discharge him from control when it is believed that such discharge will best serve the child's welfare and the protection of the public. Any order of the Council affecting a child, other than an order of final discharge, may be revoked or modified as often as conditions indicate to be desirable. Article 5143d; Sec. 16, 17.

4. A finding of delinquency is authorized where the child "habitually so deports himself as to injure or endanger (his) morals or health." Art. 2338-1; Sec. 3(f).

5. Presumably, these factors are considered in determining whether confinement is desirable. See Art. 5143d, Sec. 16.

6. In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), is a good example of the potential inequality. There the child was ordered confined for a maximum period of six years for an offense which, if committed by an adult, carries with it a maximum punishment of a fine of not less than $25.00 and not more than $50.00 or imprisonment for not more than two months. In Texas, a finding of delinquency could be based on the fact that the child habitually associates with prostitutes. Art. 2338—1, Sec. 3(g). An adult committing the same offense would face only a fine not exceeding $200.00. Tex.Ann.P.C. Arts. 607, 608.

sity, and since discrimination is the fortuitous result of classification in legislation, it is clear that a statute cannot be branded constitutionally offensive merely because it singles out a class of persons for disparate treatment which is more oppresive than nonmembers of the class must tolerate. As sometimes said, the Equal Protection Clause does not require that things different in fact be treated in law as though they were the same. It does not require equal treatment for all persons without recognition of differences in relevant circumstances.

Where a class is selected for differential treatment, the pertinent inquiry concerns the existence of some reasonable nexus between the classification adopted and a valid governmental objective. A classification is invulnerable to an "equal protection" attack if it is reasonable, and a classification is reasonable if it includes all persons who are similarly situated with respect to the law.[7]

In dealing with equal protection problems raised by legislative classifications, the Supreme Court of the United States has used

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7. Tigner v. Texas, 310 U.S. 141, 147, 60 S.C. 879, 84 L.Ed. 1124 (1940).

8. Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif.L.Rev. 341, 345—46 (1949). It has been asserted that a classifying statute is unobjectionable if it applies equally to all within the statutory class. Powell v. Pennsylvania, 127 U.S. 678, 687, 8 S.Ct. 992, 32 L.Ed. 253 (1888). But this approach would render the Equal Protection Clause practically meaningless, since it would lead to the conclusion that the requirement of equal protection is satisfied if the statute applies equally to all persons to whom it applies. A statute providing that no Republican should be allowed to hold public office would be upheld because it treats all members of the statutory class equally. This restrictive view of the effect of the Equal Protection Clause has been rejected. "Judicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal application among the members of the class defined by the legislature." McLaughlin v. Florida, 379 U.S. 184, 191, 85 S.Ct. 283, 288, 13 L.Ed. 2d 222 (1964).

at least two different approaches. In some cases, such as those involving taxation or regulation of economic activity, a classification will be upheld unless it is palpably arbitrary, irrational or capricious.[9] According to this test, which may be designated as "permissive review," a statute will be upheld if any state of facts may reasonably be conceived which would sustain the rationality of the classification.[10] This standard assigns to the Legislature the primary responsibility for evaluating the relevant facts and results in a judicial tolerance of a rather loose relationship between the classifying trait and the legislative purpose, without inquiring whether the social benefits resulting from the statute are important enough to justify the burdens imposed upon the affected class.[11] Perhaps the most important practical effect of this method of inquiring into the reasonableness of a classification is that it places upon the person attacking the statute the burden of demonstrating that the classification is utterly lacking in rational justification.[12]

If in considering appellant's contentions, we adopt this restrained or permissive mode of review, we must conclude that appellant's contentions are without merit. The purpose of our statutes relating to the handling of youthful offenders is, as in other states

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9. Metropolis Theater Co. v. City of Chicago, 228 U.S. 61, 68, 70, 33 S.Ct. 441, 57 L.Ed. 730 (1913).

10. McGowan v. Marlyland, 366 U.S. 420, 426, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961).

11. The lengths to which a court will go in reasonably conceiving a state of facts which would justify the legislation will, of course, vary with the imaginative powers of the judges. The Supreme Court has been able to find a reasonable nexus between the promotion of public safety and nepotism in the selection of river boat pilots. Kotch v. Bd. of River Port Pilot Com'rs., 330 U.S. 552, 67 S. Ct. 910, 91 L.Ed 1093 (1947). See also Goesaert v. Cleary, 335 U.S. 464, 69 S. Ct. 198, 93 L.Ed. 163 (1948).

12. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911).

having juvenile court systems, the education, treatment and rehabilitation of the child, rather than retributive punishment.[13] The emphasis on training and rehabilitation, rather than punishment, is underscored by the declaration that juvenile proceedings are civil, rather than criminal, in nature.[14] Instead of a complaint or indictment we have a "petition."[15] The hearing never results in a conviction, but may lead to an "adjudication of delinquency."[16] Where confinement of the delinquent child is indicated as the proper treatment, the child is not sentenced to prison but, instead,

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13. "The purpose of this Act is to secure for each child * * * such care, guidance and control, preferably in his own home, as will serve the child's welfare and the best interest of the state; and when such child is removed from his own family, to secure for him custody, care and discipline as nearly as possible equivalent to that which should have been given him by his parents." Art. 2338—1, Sec. 1. "The purpose of this Act is * * * to provide a program of constructive training aimed at rehabilitation and re-establishment in society of children adjudged delinquent by the courts of this state and committed to the Texas Youth Council, and to provide active parole supervision for such delinquent children until officially discharged from custody of the Texas Youth Council." Art. 5143d, Sec. 1. The purpose of the training schools, "and of all education work, training, discipline, recreation, and other activities carried on in the schools and other facilities shall be to restore and build up the self-respect and self-reliance of the children and youth lodged therein to qualify them for good citizenship and honorable employment." Id., Sec. 21.

14. "Courts have held this proceeding to be a civil, and not a criminal proceeding having as its purpose to protect the * * * delinquent child at the most critical time of his life, and is not intended to convict and punish juveniles, but to guide and direct them." In re Gonzalez, 328 S.W.2d 475, 477 (Tex.Civ.App.—El Paso 1959, writ ref'd n.r.e.).

15. Art. 2338—1, Sec. 7. In some jurisdictions, the penchant for euphemism has been carried to the extent that the petition is regarded as being filed "on behalf of" the child. Neumeyer, Juvenile Delinquency in Modern Society, 253 (1949).

16. Art. 2388—1, Sec. 13 (c).

is "committed" to a "training school."[17] The adjudication of delinquency does not carry with it any of the civil disabilities ordinarily resulting from conviction of crime, nor is the child considered to be a criminal because of such adjudication.[18]

Since the purpose of the legislation is to salvage youthful offenders, it requires no straining of the judicial imagination to find the existence of a reasonable relationship between the legislative purpose and the use of age as the classifying trait. It is indisputably the province of the Legislature to determine the manner in which various offenders will be treated, and if the difference in treatment is founded upon an arguably rational basis, the legislative decision is determinative.[19] The Legislature could reasonably have concluded that children, as a class, should be subject to indefinite periods of confinement, not to extend beyond their twenty-first birthday, in order to insure sufficient time to accord the child sufficient treatment of the type required for his effective rehabilitation. This conclusion might be based on physiological and psychological differences between children and adults, the types of crimes committed by children, their relation to the criminal world, their unique susceptibility to rehabilitation, and their reaction, as a class, to confinement and discipline, as well as reformtaive treatment. It is true that some or all of these conclusion are based on sociological, psychological and penological theories which are not universally agreed on among so-called social scientists, but the fact that eminent scholars believe such theories to be valid prevents us from branding them as palpably irrational.

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17. Id., Sec. 13(c)(2); Art. 5143d, Sec. 12.

18. Art. 2338—1, Sec. 13(d).

19. Jensen v. Gladden, 231 Or. 141, 372 P. 2d 183, 195 (1962).

Since appellant has produced no data refuting the legislative conclusion that children who engage in deviant conduct require a different type and manner of confinement than do adult criminals, the presumption of validity with which the permissive method of review shields the statute remains unpierced.

However, in some cases, the Supreme Court of the United States has applied a stricter standard, demanding more than a conceivable rational relationship between the classification and the statutory purpose. In these cases, the statute is subjected to "the most rigid scrutinty,"[20] and the ordinary presumption of constitutionality seems to melt away, so that the burden is on the person defending the statute to show a substantial, empirically grounded justification to support the differentiation.[21]

Statutory classificactions have been subjected to this rigid scrutiny, at least ostensibly, in cases where the classification is based on one of certain "suspect" traits and the statutory class is subjected to separate treatment which impinges seriously on personal rights considered as fundamental."[22]

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20. Korematsu v. United States, 323 U.S. 214, 216, 65 S.Ct. 193, 89 L.Ed. 194 (1944).

21. Loving v. Virginia, 388 U.S. 1, 8-9, 11; 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); McLaughlin v. Florida, 379 U.S. 184, 196, 85 S.Ct. 283, 13 L.E.D.2d 222 (1964); Developments in the Law—Equal Protection, 82 Harv.L.Rev. 1067, 1087-1123 (1969).

22. "The decision seems to rest upon two largely subjective judgments. * * One element is the relative invidiousness of the particular differentiation, such as between men of different race, farmer and city dweller, rich and poor, literate and illiterate, or men and women. The second element is the relative importance of the subject with respect to which equality is sought, such as the vote, the defense of a criminal prosecution, or civil litigation." Cox, The Supreme Court, 1965 Term. Forward, Constitutional Adjudication and the Promotion of Human Rights, 80 Harv.L.Rev. 91, 95 (1966).

Strict or "active" review results from the interaction of these two factors—suspect classification and serious impingement of fundamental personal liberties. Thus, if the classification is of the type considered highly suspect, such as a classification based on race, the statute will be subjected to close scrutiny even though the interest affected is not regarded as meriting a high position in the hierarchy of protected personal interests. On the other hand, the fact that the classification is relatively free from suspicion will not result in the application of a restrained or permissive standard of review if the operation of the statute seriously affects interests high on the list of the so-called "fundamental liberties." [23]

It has been suggested that some traits are not merely "suspect," but impermissible so that they may never be made the basis for classification. See Mr. Justice Rutledge, dissenting, in Kotch v. Bd. of River Port Pilot Com'rs., 330 U.S. 552, 565, 67 S.Ct. 910 (1947). This view seems indefensible. Even race, probably the most suspect classifying trait, has been validly used, according to the Supreme Court, as the basis for designating the class of persons to be forcibly relocated and held in detention camps. Korematsu v. United States, 323 U.S. 214, 65 S.Ct. 193 (1944).

"* * * an attempt at an exhaustive listing of suspect classifications would be pointless. It suffices to say that this is of necessity a rather loose category. Its content, at any particular time, will depend upon the area in which the concept of equality is struggling against the recurring forms of claims to special and unequal status—whether along racial, religious economic or even political lines." Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif.L.Rev. 341, 356 (1949).

23. See Developments in the Law—Equal Protection, 82 Harv.L.Rev. 1065, 1120-21 1127-31 (1969). Thus, the requirement of the payment of a small fee as a prerequisite to admission to a fencing match between representatives of two state-supported universities might encounter no serious constitutional obstacle, since a classification based on ability to pay a fee is not ordinarily viewed with suspicion, and the right to witness a fencing match is not regarded as a basic right. But if the classifying trait is race, rather than ability to pay, there can be no doubt that the regulation would fall, despite the relative unimportance of the right affected. Again, a statute which conditions the right to vote on the payment of a

Classifications based on age are no strangers to our law. Especially familiar are laws designed for the protection of children, such as those prohibiting the sale of intoxicants to minors. Although classifications based on age have sometimes been struck down,[24] our attention has been called to no case indicating that age is a suspect basis for classification.

If, then, a strict standard of review is to be applied in this case, the reason must be that the legislation in question seriously impinges on an important fundamental right. It might presuasively be argued that a statute which permits longer confinement of children does impinge on fundamental personal liberties, although, in the area of criminal law, courts have traditionally allowed legislatures considerable leeway in classifying offenses and offenders for sentencing purposes.[25] Apparently, it has not been thought that the possibility of a longer period of confinement, standing alone, calls for a strict standard of review.[26]

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small fee is invalid, despite the fact that a classification based on economic status might have a rational connection to the purpose of securing a qualified electorate: Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966). In the voting case, the hostile attitude of the Supreme Court would seem to have been engendered by the importance of the right affected, even though the classifying trait was relatively free from suspicion.

24. E. g. State ex rel. Greenberg v. Erickson, 159 Minn. 287, 198 N.W. 1000 (1924). There a statute exempting persons under 21 from the requirement of a license for the privilege of hunting and fishing was held unreasonable.

25. Skinner v. Oklahoma, 316 U.S. 535, 540, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); Com. of Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51, 58 S.Ct. 59, 82 L.Ed. 43 (1937).

26. An exception is Commonwealth v. Daniel, 430 Pa. 642, 243 A.2d 400 (1968) holding that a statute imposing longer sentences on women than on men convicted of the same offense was a denial of equal protection. Prior to the Daniel decision the

If the purpose of permitting longer periods of detention for children was to punish youthful offenders more severely than adult criminals, the application of a strict standard of review would seem justified. But where the legislative purpose is to benefit the affected class, a less strict standard would seem proper. We are familiar with the literature reflecting disillusionment concerning the practical administration of the rehabilitative ideal[27] and the burgeoning literature of criticism of the juvenile system in this country.[28] But, as the Texas Supreme Court pointed out only a few days ago, "while we must accept as true much of the dismal picture painted in *Gault* as to the abuses of the juvenile system, we cannot condemn out of hand the Texas Youth Council, the juvenile judges, and other trained people working in this field. The policy of the juvenile laws has been fixed by the Texas Legislature; and we conceive it to be our duty to uphold the spirit of that law * * *"[29]

The purpose of our juvenile laws is benign, rather than invidious. Whether the law is actually beneficial to the affected class is a question which is not susceptible of easy judicial determination. The determination of the beneficial effects of our sys-

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courts were consistent in upholding the imposition of longer periods of confinement, via the indeterminate sentence or commitment route, on women and youthful offenders. Rubin, Disparity and Equality of Sentencing, 40 F.R.D. 55; 76 (1966); Note 82 Harv.L.Rev. 921, 924 (1909).

27. See, generally, Kadish, Legal Norms and Discretion in the Police and Sentencing Processes, 75 Har.L.Rev. 904 (1962); Putney & Putney, Origins of the Reformatory, 53 J.Crim.L., C & P. S. 427 (1962).

28. The opinion in In re Gault, 387 U.S. 1, 87 S.Ct. 1428 (1967), is profusely footnoted to modern scholarship, both legal and sociological, pointing out the discrepancies between theory and actual practice.

29. State v. Santana, Tex., 444 S.W.2d 614 (decided July 23, 1969).

tem depends, at least in part, on complicated factual judgments of whether our juvenile program helps or impedes the salvation of child offenders. It is not necessary, in this case, to hold that the required judgment is of the sort that should be left to the political processes. But we do hold that, in the absence of at least some data indicating that the legislative promise of treatment rather than punishment is not in fact, being kept, we should not attempt, by a reasoning process alone, to determine whether the promised benefits are, in fact, being accorded to juvenile offenders.

If, in fact, in Texas the term "training school" is but a euphemism for prison; if the promised "treatment" consists of nothing more than confinement and disciplinary measure not substantially different from those charcteristic of our adult penitentiaries; if, in fact, what is called rehaiblitative treatment is inditsinguishable from ordinary penal confinement in caged and demoralizing idleness, then, perhaps, a court would not be unwilling to cut through the verbal camouflage and condemn the system because of the exposed realities. But the record before us is bare of any indication that the promise of treatment and rehabilitation has been broken, and that the legislative declaration of purpose is no more than cant and hypocrisy used to justify what is essentially a system that does no more than provide longer terms of imprisonment for children.

The judgment of the trial cuort is affirmed.

FACE OF APPELLANT'S MOTION FOR REHEARING IN THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS, ON WHICH APPEARS NOTATION OF THE COURT OVERRULING SAID MOTION.

2091

Overruled
ccc
M.V.H.
cwB

B-1939

DEC 17 1969

NO. 14819

IN THE COURT OF CIVIL APPEALS FOR THE
FOURTH SUPREME JUDICIAL
DISTRICT OF TEXAS

RUDY RIOS,

Appellant

VS.

THE STATE OF TEXAS,

Appellee

APPEAL FROM THE DISTRICT COURT
ONE HUNDRED FIFTIETH JUDICIAL DISTRICT
OF BEXAR COUNTY, TEXAS

APPELLANT'S MOTION FOR REHEARING

FILED
In the Court of Civil Appeals
AT SAN ANTONIO, TEXAS
DEC 4 - 1969
Robert L. Cook
CLERK

RICHARD E. GLASER
JOHN L. SANDERS
Attorneys for Appellant
203 W. Nueva Street
San Antonio, Texas 78207

ORDER OF THE SUPREME COURT OF TEXAS REFUSING WRIT OF ERROR, "NO REVERSIBLE ERROR"

IN THE SUPREME COURT OF TEXAS

— — — — — —

Rudy Rios) February 18,1970
No. B-1939)
vs.) From Bexar County,
The State of Texas)
) Fourth District.

Application of petitioner for writ of error to the Court of Civil Appeals for the Fourth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Rudy Rios, pay all costs incurred on this application.

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No. .....

) From County,
vs.)
) District.

Petitioner motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

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I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the order of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 9 day of March, 1970.

GARSON R. JACKSON, Clerk

By ....., Deputy.

JUDGMENT OF THE JUVENILE COURT

JUDGMENT

NO. 17,140

IN THE MATTER OF	IN THE 150TH DISTRICT
RUDY RIOS	( ) COURT OF BEXAR
A DELINQUENT CHILD	( ) COUNTY, TEXAS
	( ) SITTING AS THE
	( ) JUVENILE COURT

JUDGMENT

On May 19, 1969, in the above styled and numbered matter, came on to be heard the Petition to declare RUDY RIOS a Delinquent Child, filed herein by James E. Barlow, Criminal District Attorney of Bexar County, Texas, appearing herein by Gordon V. Armstrong; Assistant Criminal District Attorney, Bexar County, Texas; said child appearing with his guardians, Julio Cantu and Natalia Chavez, and their attorney, Mr. Richard Glaser, Bexar County Legal Aid Association; no jury having been demanded, all matters of fact, as well as law, were submitted to the Court; and the Court, having heard and considered the evidence herein, is of the opinion and finds that RUDY RIOS at the time of the hearing was 15 years of age, born May 21, 1953, and is a resident of Bexar County, Texas; and that the evidence is sufficient to sustain the allegations of such Petition herein; and that the said RUDY RIOS is a Delinquent Child; and that the welfare of said child and the best interest of the community will be served by said child's commitment to the care, custody and control of the Texas Youth Council, in Austin, Travis County, Texas:

IT IS THEREFORE ORDERED, ADJUDGED and DECREED by the Court that the said RUDY RIOS be and he is hereby

declared a Delinquent Child and ordered committed to the care, custody and control of the Texas Youth Council in Austin, Travis County, Texas, for an indeterminate period of time not to exceed the time when he shall have become twenty-one years of age; and the Chief Juvenile Probation Officer of Bexar County, Texas shall forthwith convey said child to the Gatesville State Schools for Boys, Gatesville, Texas.

Signed May 23, 1969.

JAMES A. McKAY, JR.

JUDGE PRESIDING

THE TEXAS JUVENILE ACT, ARTICLE 2338-1, VERNON'S ANNOTATED TEXAS STATUTES

Deliquent children; juvenile court established in each county; jurisdiction

Transfer of cases; custody—Purpose and basic principle

Section 1. The purpose of this Act is to secure for each child under its jurisdiction such care, guidance and control, preferably in his own home, as will serve the child's welfare and the best interest of the state; and when such child is removed from his own family, to secure for him custody, care and discipline as nearly as possible equivalent to that which should have been given him by his parents.

The principle is hereby recognized that children under the jurisdiction of the court are wards of the state, subject to the discipline and entitled to the protection of the state, which may intervene to safeguard them from neglect or injury and to enforce the legal obligations due to them and from them.

Construction of the Act

Sec. 2. This Act shall be liberally construed to accomplish the purpose herein sought.

Definitions

Sec. 3. In this Act, unless the context requires a different definition, the word "court" means the juvenile court; the word "judge" means the judge of the juvenile court; of ten years and under the age of eighteen years and any male person over the age of ten years and under the age of seventeen years. The term "delinquent child" means the word "child" means any female person over the age any child who

(a) violates any penal law of this state of the grade of felony; or

(b) violates any penal law of this state of the grade of misdemeanor where the punishment prescribed for such offense may be by confinement in jail; or

(c) habitually violates any penal law of this state of the grade of misdemeanor where the punishment prescribed for such offense is by pecuniary fine only; or

(d) habitually violates any penal ordinance of a political subdivision of this state; or

(e) habitually violates a compulsory school attendance law of this state; or

(f) habitually so deports himself as to injure or endanger the morals or health of himself or others; or

(g) habitually associates with vicious and immoral persons.

Establishment of Juvenile Courts

Sec. 4. There is hereby established as follows in each county of the State a court of record to be known as the juvenile court, having such jurisdictions as may be necessary to carry out the provisions of this Act.

In all counties having only one district court and having a juvenile board, such board shall designate the county court or the district court to be the juvenile court for such county, and in all other counties having only one district court, but no juvenile board, the county judge and the district judge of such county shall designate the county or district court of such county as the juvenile court. In counties having two or more district courts, or one or more district courts and one or more criminal district courts, and having a

juvenile board, such board shall designate one of such district courts or criminal district court, or the county court, to be the juvenile court of such county, and in all other counties having two or more district courts, or one or more district courts and one or more criminal district courts, the judges of such courts and the county judge of such counties shall designate one of such district courts or criminal district courts as the juvenile court of such county; provided, however, that in the event neither of the judges of the district courts of criminal district courts is a resident of the county, the county court may be designated as the juvenile court of such county. All such designations may be changed from time to time by such boards or such judges as are authorized herein to make the same, for the convenience of the people and the welfare of minors; provided that there shall be at all times a juvenile court designated for each county. It is the intent of the Legislature that in selecting a court to be the juvenile court of each county, such selection be made as far as practicable so that the court designated as the juvenile court will be one which is presided over by a judge who has a sympathetic understanding of the problems of child welfare, and that changes in the designations of juvenile courts be made only when the best interest of the public require it.

Any criminal district court so designated as a juvenile court, and the judges thereof, shall have the same jurisdiction, powers, authority and duties as are now, or may be hereafter, conferred upon district courts in regard to such children.

In all counties having two or more district courts, wherein a district court is designated as the juvenile court of said county, it shall give preference to cases of child delin-

quency, dependency, neglect, support, custody, and adoption, and to contempt proceedings growing out of or ancillary to such cases, and all other district courts in such counties may, from time to time, transfer to such district court as has been designated the juvenile court of such county, all such cases on their dockets, and may transfer to such district court as has been designated the juvenile court any or all cases of annulment or divorce which involve child custody or support, with the consent of the judge of the juvenile court.

Immediately after the designation of a juvenile court for each county, as herein provided for, the clerks of the courts of such counties shall transfer all cases of juvenile delinquency on their dockets to the docket of the juvenile court so designated, under the direction of the judges of said courts, and thereafter all case of juvenile delinquency shall be filed in such juvenile courts.

In all counties having two or more district courts, or one or more district courts and one or more criminal district courts, wherein a district court or criminal district court is designated as the juvenile court of said county, in addition to cases of juvenile delinquency, all new cases of dependency, neglect, support, child custody, and adoption shall henceforth be filed in the juvenile court of such counties; provided, however, that nothing herein contained shall prevent the transfer of such cases to other courts having jurisdiction thereof under existing laws. The above provisions shall not be construed as requiring any divorce cases to be filed in any particular court, but same may be transferred to the juvenile court under the provisions above set forth where it appears to the judge in whose court such

case is pending and the judge of the juvenile court, to be desirable to do so.

The jurisdiction, powers, and duties thus conferred upon the established courts hereunder are super-added jurisdictions, powers, and duties; it being the intention of the Legislature not to create hereby any additional offices.

Appeals from judgments of criminal district courts rendered in juvenile cases shall be taken to proper Court of Civil Appeals.

Jurisdiction

Sec. 5. (a) The juvenile court has exclusive original jurisdiction in proceedings governing any delinquent child. However, in those cases specified in Section 6 of this Act, the juvenile court may waive jurisdiction to the appropriate district court or criminal district court. The juvenile court is considered in session at all times.

(b) Nothing in this Act deprives other courts of the right to determine custody of children either upon writs of habeas corpus or when such custody is incidental to the determination of cases pending in those courts.

(c) When the juvenile court obtains jurisdiction of a delinquent child, its jurisdiction continues until the child is discharged by the court or until he becomes twenty-one years of age unless committed to the control of the agency of the state charged with the care, training, control of, or parole of delinquent children. The court's continued jurisdiction does not prejudice or bar subsequent or additional proceedings against the child under the provision of this Act.

(d) Nothing in this Act prevents criminal proceedings against a child for perjury.

Transfer and waiver of jurisdiction

Sec. 6 (a) When a child under the jurisdiction of a court moves from one county to another the court may transfer the case to the court in the county of the child's residence if the transfer is in the child's best interest. The transfering court shall forward transcripts of records in the case to the judge of the receiving court, who shall file them in the office of his clerk.

(b) If a child is charged with the violation of a penal law of the grade of felony and was fifteen years of age or older at the time of the commission of the alleged offense, the juvenile court may, within a reasonable time after the alleged offense, waive jurisdiction by following the requirements set out in Subsections (c) through (j) of this section, and transfer the child to the appropriate district court or criminal district court for criminal proceedings.

(c) The juvenile court shall conduct an informal hearing under Section 13 of this Act on the issue of waiver of jurisdiction.

(d) Prior to the hearing, the juvenile court shall order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense.

(e) The juvenile court shall appoint counsel for any child who does not have retained counsel, and shall allow counsel at least ten days to prepare for the hearing. The presence of counsel at the hearing may not be avoided or waived. Appointed counsel is entitled to a fee for each day actually spent in court in the amount and from the source as specified in Article 26.05 of the Code of Criminal Procedure, or any future amendment of that article.

(f) The juvenile court shall give counsel access to all the records relating to the child including the report of the investigation that must precede the hearing in the possession of the court, its staff, or employees. The juvenile court may refuse to reveal the source of any information if it finds that revelation would be injurious to the child or would prejudice the future availabiity of similar information. If the court refuses to reveal the source of any information and the child or his counsel objects to the refusal, the court shall preserve the identity of the source and make it available to the district or criminal district court if the child is transferred for criminal proceedings.

(g) After full investigation and hearing the juvenile court shall retain jurisdiction of the case unless it determines that, because of the seriousness of the offense or the background of the offender, the welfare of the community requires criminal proceedings.

(h) In making the determination under Subsection (g) of this section, the court shall consider, among other matters:

(1) whether the alleged offense was against person or property, with greater weight in favor of waiver given to offenses against the person;

(2) whether the alleged offense was committed in an aggressive and premeditated manner;

(3) whether there is evidence upon which a grand jury may be expected to return an indictment;

(4) the sophistication and maturity of the child;

(5) the record and previous history of the child;

(6) the prospects of adequate protection of the public and the likelihood of reasonable rehabilitation of the child

by use of procedures, services, and facilties currently available to the juvenile court.

(i) If the juvenile court retains jurisdiction, the child is not subject to prosecution at any time for any offense alleged in the petition or for any offense within the knowledge of the juvenile judge as evidence by anything in the record of the proceeding.

(j) If the juvenile court waives jurisdiction it shall certify its action, including the written order and findings of the court and accompanied by a complaint against the child, and transfer the child to the appropriate district court or criminal district court for criminal proceedings. Upon transfer of the child for criminal proceedings he shall be dealt ~~with as an~~ adult and in accordance with the Code of Criminal Procedure. The transfer of custody is an arrest. However, the examining trial shall be conducted by the district court or criminal district court which may remand the child to the jurisdiction of the juvenile court.

(k) If the child's case is brought to the attention of the grand jury and the grand jury does not indict for the offense charged in the complaint forwarded by the juvenile court, the district court or criminal district court shall certify the grand jury's failure to indict to the juvenile court. Upon receipt of the certification the juvenile court may resume jurisdiction of the child.

Information, investigation, petition

Sec. 7. Any person may, and any peace officer shall, give to the Judge, County Attorney, or to the Probation Officer of the county, information in his possession that a child is within the provisions of this Act. Thereupon the

Judge, the County Attorney or the Probation Officer shall make or have made, preliminary inquiry to determine whether the interests of the public or of the child require that further action be taken. If either the Judge or the County Attorney shall determine that formal jurisdiction should be acquired, the County Attorney shall prepare and file in the court, or any attorney may prepare and file in the court, a petition alleging briefly the facts which bring said child within the provisions of this Act, and stating: (1) the name, age and residence of the child; the names and residences, (2) of his parents, (3) of his legal guardian, if there be one; (4) of the person or persons having custody or control of the child; and (5) of the nearest known relative, if no parent or guardian can be found. If any of the facts herein required are not known by the petitioner, the petition shall so state. The proceedings shall be styled "In the matter of ———— a delinquent child".

Venue

Sec. 7-A. The petition referred to under Section 7 of this Act may be filed in the Juvenile Court of the county of residence of said child or of the county wherein the acts constituting said child a delinquent child were committed.

Counsel

Sec. 7-B. (a) Whenever the court determines that the child alleged to be a delinquent child is not represented by counsel and (after giving the parents, guardian, or other person or persons responsible for the care and support of the child a reasonable opportunity to be heard) that the parents, guardian, or other person or persons responsible for the care and support of the child are financially able to employ counsel, the court shall order the parents, guardian,

or other person responsible for the care and support of the child to employ counsel to defend the child. The court shall have full power to enforce said orders by contempt proceedings after ten (10) days notice to such parent, guardian, or other person or persons responsible for the care and support of the child.

(b) Whenever the court determines that the child alleged to be a delinquent child is not represented by counsel and that the child, parents, guardian, and other persons responsible for the care and support of the child are too poor to employ counsel, the court shall appoint one or more practicing attorneys to defend the child. In making the determination, the court may require the child, parents, guardian, and other persons responsible for the care and support of the child to file an affidavit, may call witnesses and hear any relevant testimony or other evidence.

(c) The counsel is entitled to ten (10) days to prepare for trial, but may waive the time by written notice signed by the counsel and the child alleged to be a delinquent child.

(d) A counsel appointed to defend a child alleged to be a delinquent child shall be paid from the general fund of the county in which the prosecution was instituted according to the following schedule:

(1) for each day in trial court representing the child a fee of not less than Twenty-five Dollars ($25) nor more than Fifty Dollars ($50);

(2) for expenses incurred for purpose of investigation and expert testimony, not more than Two Hundred and Fifty Dollars ($250);

(3) for the prosecution to a final conclusion of a bona fide appeal to the Court of Civil Appeals or Court of Criminal

Appeals, a fee of not less than One Hundred Dollars ($100) nor more than Two Hundred and Fifty Dollars ($250).

(e) The minimum fee will be automatically allowed unless the trial judge orders more within five (5) days of the judgment. An attorney may not receive more than one fee for each day in court, regardless of the number of cases in which he appears as appointed counsel on the same day. All payments made under the provisions of this Section may be included as costs of court.

Summons, notice, custody of the child

Sec. 8. After a petition shall have been filed, and after such further investigation as the Judge may direct, unless the parties hereinafter named shall voluntarily appear, the court shall issue a summons reciting briefly the substance of the petition, and requiring the person or persons who have the custody or control of the child to appear personally and bring the child before the court at a time and place stated. If the person so summoned shall be other than the parent or guardian of the child, then the parent or guardian, or both, shall be notified of the pendency of the case and of the time and place appointed, by personal service before the hearing, if they reside within the jurisdiction of the court, except as hereinafter provided. Summons may be issued requiring the appearance of any other person whose presence, in the opinion of the Judge, is necessary.

If it appears that the child is in such condition or surroundings that his welfare requires that his custody be immediately assumed by the court, the Judge may cause to be endorsed upon the summons an order that the officer serving the same shall at once take the child into custody.

Service of summons

Sec. 9. Service of summons shall be made personally by a probation officer or peace officer by the delivery of attested copies thereof to the parent, guardian, or person having custody of the child who is summoned; provided, that jurisdiction may be obtained by the court if the court is satisfied that said officer has made diligent effort to locate such person or persons and has been unsuccessful in locating said persons. It shall be sufficient to confer jurisdiction if service is effected at least two (2) days before the time fixed in the summons for the return thereof.

Failure to obey summons, warrant

Sec. 10. If any person summoned as herein provided shall, without reasonable cause, fail to appear, he may be proceeded against for contempt of court. In case the summons cannot be served, or the parties served fail to obey the same, or in any case when it shall be made to appear to the Judge that the servicing will be ineffectual, or the welfare of the child requires that he shall be brought forthwith into the custody of the court, a warrant may be issued against the child himself.

Release of child taken into custody

Sec. 11. Whenever any officer takes a child into custody, he may release said child to a parent, guardian, or any other person upon receipt of a written or oral promise of said person to assume complete responsibility for said child and to have him before the probation officer or the court at any time then, or subsequently, specified by said officer. If not so released, such child shall be placed in the custody of a probation officer or other person designated

by the court or be taken immediately to the probation department, the court, or to the place of detention designated by the court. The court may make a general order designating such places of detention which may include private foster or boarding homes for children, or such other places of detention which to the court seem desirable. The County Commissioners Court may pay for boarding or foster home care for such children to be detained, or all children coming within the meaning of this Act whether prior to, or after the child has been adjudged a "delinquent child".

Any peace officer or probation officer shall have the right to take into custody any child who is found violating any law or ordinance, or who is reasonably believed to be a fugitive from his parents or from justice, or whose surroundings are such as to endanger his health, welfare, or morals. The child shall forthwith be brought to the Judge, who shall order the child's release, or his temporary detention either in the compartment provided for the custody of juveniles, or by a suitable person or agency as in the judgment of the court may seem proper. If the child is ordered detained, the petition provided for herein shall be filed immediately. In every such case the said officer shall refer all such cases, together with information they have secured concerning the child, to the court or the probation department, and the case shall then be proceeded with as specified in this Act, provided that no child shall be taken before a Police Court or a Justice of Peace Court.

Transfer from other courts

Sec. 12. If, while a criminal charge or indictment is pending against any person in a court other than a juvenile court, it is ascertained that the person is a child at the time

of the trial for the alleged offense, it is the duty of the court in which the case is pending to transfer the child immediately together with all papers, documents, and records of testimony connected with the case to the juvenile court of the county unless the child is being held under the authority of Section 6 of this Act. The transferring court shall order the child to be taken forthwith to the place of detention designated by the juvenile court, or to the juvenile court itself, or to release the child to the custody of a probation officer or any suitable person to appear before the juvenile court or the probation department of the county at a time designated. The receiving juvenile court shall set the case for hearing and dispose of the case as if it had been instituted in that court originally. Unless the child is subsequently transferred by the juvenile court as provided by Section 6 of this Act, he is not subject to prosecution at any later date for the alleged offense.

Hearing, judgment

Sec. 13. (a) The judge may conduct the hearing of any case in an informal manner and may adjourn the hearing from time to time. In the hearing the general public may be excluded. All cases involving children shall be heard separately from the trial of cases against adults.

(b) If no jury is demanded, the judge shall proceed with the hearing. No jury may be allowed in the hearing provided in Section 6 of this Act. When the proceeding is with a jury, the verdict shall state whether the child is a "delinquent child" within the meaning of this Act.

(c) If the judge or jury finds that the child is delinquent, or otherwise within the provisions of this Act, the court may order duly entered proceed as follows:

(1) place the child on probation or under supervision in his own home or in the custody of a relative or other fit person, upon such terms as the court shall determine:

(2) commit the child to a suitable public institution or agency or to a suitable private institution or agency authorized to care for children; or place the child in a suitable family home or parental home for an indeterminate period of time, not extending beyond the time the child shall reach the age of twenty-one years;

(3) make such further disposition as the court may deem to be for the best interest of the child, except as herein otherwise provided.

(d) No adjudication upon the status of any child in the jurisdiction of the juvenile court shall operate to impose any of the civil disabilities ordinarily imposed by conviction, nor shall any child be deemed a criminal by reason of such adjudication, nor shall such adjudication be deemed a conviction, nor shall any child be charged with or convicted of any crime except perjury in any court except as provided in Section 6 of this Act.

(e) The disposition of a child or any evidence given in the court shall not be admissible as evidence against the child in any case or proceeding in any court other than the juvenile court, nor shall such disposition or evidence operate to disqualify a child in any further civil service examination, appointment or application. However, nothing in this subsection prevents a showing before the district court or the grand jury that the child has been transferred for criminal proceedings under Section 6 of this Act.

(f) Whenever the court commits a child to any institution or agency, it shall transmit with the order of commit-

ment a summary of its information concerning such child and give in the order of commitment the birth date of the child or attach thereto a certified copy of the birth certificate."

Judgments for support; enforcement

Sec. 13-A. It is further provided that the Juvenile Court in which the child has been adjudged delinquent, may, after giving the parent or other responsible person a reasonable opportunity to be heard, adjudge that such parent or other responsible person shall pay in the manner directed by the court such sum as will in whole or in part support such child whether or not the child is committed to the custody of his own parent or guardian, or whether to any other person, agency or institution. The court shall have full power to enforce said judgments for support by civil contempt proceedings after ten (10) days notice to such parent, guardian, or other person responsible for the care and support of the child, of his or her, or of their failure or willful refusal to carry out the terms of such an order for support. The court shall have power and authority to alter or change such judgments, or suspend the same, as the facts and circumstances and justice may require, upon notice to such parent as above provided for.

Any person interested in any such case may appear therein and may be represented by counsel, and may demand a jury as in other cases. If no jury is demanded, it shall be deemed waived. The Judge of the court, of his own motion, may order the jury to try such a case.

Asuumption or financial responsibility for acts of delinquents; posting bond

Sec. 13-B. (a) When any child be adjuged a delinquent child pursuant to Section 3 and Section 13 of this Act and shall be placed on probation in the custody or under the supervision of the child's parents or legal guardian, pursuant to Section 13(1) or Section 13-A of this Act, such parent or person shall assume liability in an amount not to exceed One Thousand Dollars ($1,000) and shall thereafter be financially liable, not to exceed said amount, to any person suffering damages as a result of the willful or malicious acts or conduct of the child in the same manner and to the same extent that said child would be civilly liable under and by virtue of the laws of this State, were the child a full competent adult. The liability imposed by this Section shall continue for the length of the term of the child's probation as set by Juvenile Court.

(b) When any child has been adjudged delinquent, pursuant to Section 3 and Section 13 of Chapter 204, Acts of the Forty-eighth Legislature, 1943, and he or she shall be placed in the custody of his or her parents or any other relative or fit person by the Juvenile Court, (as provided in Section 13(1) or Section 13-A of Chapter 204 of the Forty-eighth Legislature, 1943) the parents or other relative or fit person or persons under whose supervision the child has been placed may be required by the judge of the Juvenile Court, at his discretion to post a cash bond. Such bond shall provide that the child will not violate the terms of his or her probation as prescribed by the Juvenile Court.

(c) The amount of cash bond required by the foregoing Section shall be set by the Judge of the Juvenile Court, at his discretion, but shall not be set so as to exceed:

(1) Seven Hundred Fifty Dollars ($750) when the child has been declared delinquent for violating any penal law of the grade of felony;

(2) Five Hundred Dollars ($500) when the child has been declared delinquent for violating any penal law of the grade of misdemeanor punishable by confinement in jail, or by the habitually violating any penal law of the grade of misdemeanor punishable by pecuniary fine only;

(3) Three Hundred Dollars ($300) when the child has been adjudged delinquent for habitually violating any penal ordinance of a political subdivision of this State, or habitually violating a compulsory school attendance law, or habitually so deporting himself or herself as to injure or endanger the morals or health of himself or herself or others or habitually associating with vicious and immoral persons.

Said cash bond, when required, shall be deposited with the Juvenile Court, and the Judge of said Court is authorized to transfer said cash bond for deposit with the County Treasurer or any responsible banking institution for safekeeping subject to disposition under further orders of said Court.

(d) Should the terms, as set by the Juvenile Court, of the child's probation be violated, the cash bond shall be subject to being forfeited in accordance with the general laws of this State pertaining to bond forfeiture.

(e) When said cash bond has been forfeited in accordance with the laws of this State applicable thereto, the proceeds shall first be used and applied to pay for any damages caused by any acts or conduct of said child that were in violation of the terms of said child's probation and

for which said bond was forfeited. Any amount of the said cash bond remaining shall be paid on the direction of the Court to the Texas Youth Council for its use and in furtherance of said Council's purpose as provided in Section 1, Chapter 538, Acts of the Fifty-first Legislature, 1949.

(f) If at the expiration of the term of the child's probation, the cash bond has not been forfeited nor is in the process of being forfeited in accordance with the general law applicable thereto, then the said cash bond shall be of no further force or effect and the amount thereof shall be returned by direction of the Juvenile Court to the person who deposited the bond with the Court.

(g) The County Attorney and/or District Attorney of the County as the case may be shall represent the State in any proceedings for bond forfeiture arising under this Act.

Sec. 14. An order of the Juvenile Court in the case of a child shall be subject to modification or revocation from time to time, except as provided in Section 5 and Section 6 of this Act as amended by Section 2 and Section 3 hereof, respectively. The Court may resume jurisdiction at any time subsequent to the expiration of the release or parole conditions and restrictions placed on the child by the agency of the State charged with the care, training, control of and parole of delinquent children and may retain jurisdiction until the child is twenty-one (21) years of age if not already discharged by the Court.

A petition may be filed with the committing court requesting the re-opening of the case of a child who has been committed by the court to the custody of an institution, agency or person; if the court is of the opinion that the best interest of the child will be served, it may at its

discretion proceed to hear and determine the question at issue. Except as provided in Section 5 of this Act as amended by Section 2 hereof, the court may thereupon order that such child be restored to the custody of its parents or guardian or be retained in the custody of the institution, agency or person; and may direct such institution, agency or person to make other arrangements for the child's care and welfare as the circumstances of the case may require; or the court may make a further order or commitment.

Records

Sec. 15. Juvenile Court records shall not be inspected by persons other than probation officers or other officers of the Juvenile Court unless otherwise directed by the court but information by juvenile cases in the grade of felony shall be made available by the court to the agencies responsible for the implementation of the federal Omnibus Crime Control and Safe Streets Act of 1968, Pub Law 90—351 (June 19, 1968).

Delinquent charged with felony; court records; open hearing

Sec. 15-A. If a child has been charged with the violation of a penal law of the grade of felony and if the child has previously been declared delinquent, officials concerned with the case shall release upon request information as to the name and address of the child and the alleged offense. Hearings on the case in the juvnile court shall be open to persons having a legitimate interest in the proceeding, including representatives of the news media; and juvenile court records shall be open to inspection by representatives of the news media.

Physical and mental examination

Sec. 16. The Court may cause any person coming

under its jurisdiction to be examined by a physician, psychiatrist or psychologist appointed by the court. If it is determined that the child is either feeble-minded or mentally ill, it shall be the duty of the Judge of the Juvenile Court to proceed to have the necessary legal steps taken to have said child adjudged feeble-minded or insane.

Place of detention

Sec. 17. No female person over the age of ten (10) years and under the age of eighteen (18) years, or any male person over the age of ten (10) years and under the age of seventeen (17) years, shall be placed or committed to any compartment of any jail or lockup in which persons over juvenile age are incarcerated or detained, but shall be placed in a room or ward separate and apart from that occupied by adults except as provided under the transfer proceeding as set out in Section 6 of this Act as amended by Section 3 hereof. The proper authorities of all counties shall provide suitable place of detention for such juveniles separate and apart from any jail or lockup in which adults are confined. Said detention place may be in the same building housing adults, or in a building separate and apart from that where adults are confined.

Court Sessions

Sec. 18. Sessions of the court shall be held as the Judge shall from time to time determine. Suitable quarters shall be provided by the Commissioners Court of each county for the hearing of cases and for the use of the judge, the probation officer and other employees of the court.

Cooperation

Sec. 19. It is hereby made the duty of every county, town or municipal official or department to render all assistance and co-operation within his or its jurisdictional power which may further the objects of this Act. All institutions or agencies to which the court sends any child are hereby required to give to the court or to any officer appointed by it, such information concerning such child as said court or officer may require. The court is authorized to seek the co-operation of all societies or organizations having for their objects the protection or aid of all children who come within the meaning of this Act.

Contempt

Sec. 20. Any person who willfully violates, neglects or refuses to obey or perform any order of the court may be proceeded against for contempt.

Appeals

Sec. 21. Any appeal may be taken by any party aggrieved to the Court of Civil Appeals, and the case may be carried to the Supreme Court by writ of error or upon certificate, as in other civil cases. Written notice of appeal shall be filed with the Juvenile Court within five (5) days after the entering of the order. An appeal, in the case of a child, shall not suspend the order of the Juvenile Court, nor shall it discharge the child from the custody of that court or of the person, institution or agency to whose care such child shall have been committed, unless that court shall so order. However, the appellate court may provide for a recognizance bond. If the appellate court does not dismiss the proceedings and discharge the child, it shall

affirm or modify the order of the Juvenile Court and remand the child to the jurisdiction of the Juvenile Court for supervision and care, and thereafter the child shall be and remain under the jurisdiction of the Juvenile Court in the same manner as if such court had made said order without an appeal having been taken.

Transcription of reporter's notes

Sec. 21-A. The attorney (representing a child adjudged to be a delinquent child on appeal) desiring to have included in the record on appeal a transcription of notes of the reporter shall have the responsibility of obtaining such transcription and furnishing same to the clerk in duplicate in time for inclusion in the record and shall pay therefore. The court will order the reporter to make such transcription without charge to the attorney if the court finds, after hearing, that the child, parents, guardian, and other persons responsible for the care and support of the child are too poor to pay or give security therefore. Upon certificate of the court that this service has been rendered, payment thereof shall be made from the general funds by the county in which the offense is alleged to have been committed. The court reporter shall report any portion of the proceedings requested by either party or directed by the court.

Constitutionality

Sec. 23. If any section, sub-divison or clause of this Act shall be held to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portions of the Act.

Existing laws, effect on; original jurisdiction of district court

Sec. 24-A. This Act shall in no wise alter or affect existing laws with reference to dependent or neglected children as that term is defined by Article 2330, Revised Civil Statutes, 1925, and the District Court only shall have original jurisdiction in all proceedings wherein it is sought to have a child adjudged to be a dependent or neglected child, and its findings in such cases shall be entered in a book kept for that purpose to be known as "Juvenile Record."

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NO. [redacted]159

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted]1970

R. R., *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

On Appeal From The Court of Civil Appeals
For The Fourth Supreme Judicial District of Texas

MOTION TO DISMISS OR AFFIRM

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NO. 1574

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

R. R., *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

On Appeal From The Court of Civil Appeals
For The Fourth Supreme Judicial District of Texas

MOTION TO DISMISS OR AFFIRM

The Appellee State of Texas respectfully moves the Court to dismiss the appeal in this cause on the ground that the appeal does not present a substantial federal question and further moves the Court, in the alternative, to affirm the judgment sought to be reviewed on the ground that it is manifest that the question on which the decision of the cause depends is so unsubstantial as not to need further argument.

OPINION BELOW

The opinion below will be officially reported as *R.R. v. the State of Texas*, — S.W.2d — (Tex.Civ.App. - San Antonio, 1969, error ref., n.r.e.), and is included in the appendix to the Jurisdictional Statement of Appellant at pages 19-22.

JURISDICTION

The Appellant seeks to invoke the jurisdiction of this Court under 28 U.S.C.A., Section 1257(2).

STATE STATUTE INVOLVED

This appeal raises the question of the constitutionality of Article 2338-1, Section 13(c)(2), Texas Civil Statutes (Vernon, 1948) (Acts 1943, 48th Leg., p. 313, ch. 204, as amended by Acts 1965, 59th Leg., p. 1256, ch. 577, sec. 5, and Acts 1967, 60th Leg., p. 1082, ch. 475, sec. 6). The entire Article 2338-1 is set out in the appendix to the Jurisdictional Statement at pages 40-63. Section 13 reads as follows:

> "(a) The judge may conduct the hearing of any case in an informal manner and may adjourn the hearing from time to time. In the hearing the general public may be excluded. All cases involving children shall be heard separately from the trial of cases against adults.
>
> "(b) If no jury is demanded, the judge shall proceed with the hearing. No jury may be allowed in the hearing provided in Section 6 of this Act. When the proceeding is with a jury, the verdict shall state whether the child is a 'delinquent child' within the meaning of this Act.
>
> "(c) If the judge or jury finds that the child is delinquent, or otherwise within the provisions of this Act, the court may by order duly entered proceed as follows:
>
> "(1) place the child on probation or under supervision in his own home or in the custody of a relative or other fit person, upon such terms as the court shall determine;
>
> "(2) commit the child to a suitable public institution or agency or to a suitable private in-

stitution or agency authorized to care for children; or place the child in a suitable family home or parental home for an indeterminate period of time, not extending beyond the time the child shall reach the age of twenty-one years;

"(3) make such further disposition as the court may deem to be for the best interest of the child, except as herein otherwise provided.

"(d) No adjudication upon the status of any child in the jurisdiction of the juvenile court shall operate to impose any of the civil disabilities ordinarily imposed by conviction, nor shall any child be deemed a criminal by reason of such adjudiciation, nor shall such adjudiciation be deemed a conviction, nor shall any child be charged with or convicted of any crime except perjury in any court except as provided in Section 6 of this Act.

"(e) The disposition of the child or any evidence given in the court shall not be admissible as evidence against the child in any case or proceeding in any court other than the juvenile court, nor shall such disposition or evidence operate to disqualify a child in any further civil service examination, appointment or application. However, nothing in this subsection prevents a showing before the district court or the grand jury that the child has been transferred for criminal proceedings under Section 6 of this Act.

"(f) Whenever the court commits a child to any institution or agency, it shall transmit with the order of commitment a summary of its information concerning such child and give in the order of commitment the birth date of the child or attach thereto a certified copy of the birth certificate."

QUESTION PRESENTED

Appellant raises the question of whether Section 13 (c) (2) of Article 2338-1 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the prohibition against cruel and unusual punishment in the Eighth Amendment because the statute authorizes the confinement of a juvenile for a longer period of time than an adult would serve for committing the same offense as the juvenile.

STATEMENT OF THE CASE

Appellee State of Texas is in general agreement with the history of the case set forth in paragraphs (i) and (ii) under Jurisdiction on pages 2 and 3 of the Jurisdictional Statement. The issue of constitutionality was raised by Appellant for the first time in the Court of Civil Appeals below and was rejected.

ARGUMENT

The General Purpose Of Juvenile Laws Is Broad.

The general purpose of laws relating to juveniles should be considered whenever the terms of such statutes are being interpreted. The juvenile laws have traditionally aimed at prevention and correction of undesirable development or behavior of a child rather than mere punishment. For this reason the laws pertaining to juveniles have been regarded as civil rather than criminal. The statutes have been designed to promote the welfare of children, to prevent delinquency, and to reform delinquent children. *People v. Hinkley,* 199 N.Y.S. 101 (Sup.Ct., Monroe Co., 1923); *State v. Buckner,* 254 S.W. 179 (Mo.Sup.Ct., 1923);

People v. Deibert, 256 P.2d 355 (Cal.App.2d, 1953). Thus the laws are protective in nature to give a youth a chance to become a worthy citizen. *In re Perham,* 184 A.2d 449, 100 A.L.R.2d 1238 (N.H.Sup.Ct., 1962). The juvenile proceedings are designed to check a criminal tendency in its inception. *Young v. Knight,* 329 S.W.2d 195, 77 A.L.R.2d 994 (Ky.Ct.App., 1959).

The courts have recognized that the state has a greater duty toward children than for adults. See, e.g., *In re Santillanes,* 138 P.2d 503 (N.M.Sup.Ct., 1943). This Court ruled in *Prince v. Commonwealth of Massachusetts,* 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), that the state has the authority to protect the welfare of children and made the following comment:

> "The state's authority over children's activities is broader than over like actions of adults . . . A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies . . ." (321 U.S. 158, 168, 64 S.Ct. 438, 443).

This rule was followed in *Ginsberg v. State of New York,* 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968), a case involving an obscenity law protecting minors and having a question of free speech and press. The following comment was made:

> "The well-being of its children is of course a subject within the State's constitutional power to regulate . . ." (390 U.S. 629, 638, 88 S.Ct. 1274, 1280).

Nothing in the decisions of *In re Gault,* 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), or *In re Winship,* — U.S. —, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), abridged the right of the state to act for the welfare of minors. Both *Gault* and *Winship* were concerned

with the constitutional rights of the minor at the adjudacatory stage at which the determination of delinquency was made. The constitutionality of the juvenile laws was not in issue. The *Gault* case actually involved a commitment at least partly based on an act by the minor which carried a punishment of only two months for adults but which resulted in potential confinement up to six years for the minor, but the Court made no comment on the period of confinement or the statute authorizing confinement until the minor reached age 21. The Court in the *Winship* decision recognized that:

> ". . . It is true, of course, that the juvenile may be engaging in a general course of conduct inimical to his welfare which calls for judicial intervention . . ." (90 S.Ct. 1068, 1074).

Neither *Gault* nor *Winship* afforded Appellant the relief sought in this proceeding.

The Texas Statute Presents No Denial Of Due Process Or Equal Protection.

Appellant urges that the two constitutional guarantees of due process and equal protection of the laws have been violated because he has been declared delinquent and committed to the Texas Youth Council for an indeterminate period not to exceed his twenty-first birthday, a period of time in excess of the sentence which would have been received by an adult who was convicted of the same offense committed by Appellant in violation of Article 1350, Texas Penal Code (Vernon, 1948) (statute set forth on pages 5 and 6 of the Jurisdictional Statement). This view cannot be substantiated.

Laws pertaining to juveniles and youthful offenders have been attacked in various courts on the ground that the statutes contravene due process and equal protection of the laws, but the statutes have been upheld. The courts have recognized the broad power of the state to act for the welfare of minors. The juvenile and youthful offender laws have been justified as benefitting the youth by providing special treatment for rehabilitation, even when the youths may face potentially longer confinement than adults who commit the same acts. The use of age brackets has been found to be a reasonable classification because of the general purpose of juvenile laws. *In re Santillanes,* supra; *In re Herrera,* 143 P.2d 345 (Cal. Sup.Ct., 1943); *State v. Meyer,* 37 N.W.2d 3 (Minn. Sup.Ct., 1949); *Wheeler v. Shoemake,* 57 So.2d 267 (Miss.Sup.Ct., 1952); *People ex rel. Meltsner v. Follette,* 302 N.Y.S.2d 624 (App.Div.2d, 1969).

The federal courts have clearly seen the need for using different standards for youthful offenders than for adults and for providing special treatment. The Federal Youth Corrections Act has been designed to give preventative guidance and training and correctional treatment for rehabilitation of youths rather than punishment and has been upheld repeatedly against due process and equal protection claims. Due to the special rehabilitative purpose of the statute, the courts have approved confinement under the act longer than that imposed by the statutes setting forth the particular offenses involved. *Cunningham v. United States,* 256 F.2d 467 (5th Cir., 1958); *Carter v. United States,* 306 F.2d 283 (D.C.Cir., 1962); *Rogers v. United States,* 326 F.2d 56 (10th Cir., 1963); *Eller v. United States,* 327 F.2d 639 (9th Cir., 1964); *Foston v. United*

States, 389 F.2d 86 (8th Cir., 1968), certiorari denied, 392 U.S. 440, 88 S.Ct. 2319, 20 L.Ed.2d 1401 (1968); *Abernathy v. United States,* 418 F.2d 288 (5th Cir., 1969).

In general equal protection problems have been approached in two ways. In some cases, such as those involving economic regulation, the courts have exercised a "permissive review" and upheld the statutes involved if any state of facts reasonably justifies the law because the legislatures have wide latitude in making laws affecting some groups differently than others. Thus a classification should be upheld unless highly arbitrary and wholly irrelevant to the objective of the law. *McGowan v. State of Maryland,* 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). Under the second approach, however, the courts make a "strict review" of laws involving suspect classifications, such as race, and serious infringement of fundamental personal liberties and require a high degree of justification. *Skinner v. State of Oklahoma,* 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); *Korematsu v. United States,* 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944). Even in this class of cases, though, the states in exercising the police power do not have to ignore experience marking a class of offenders or a type of offenses for special treatment. *Skinner v. State of Oklahoma,* supra.

Whichever standard is applied to the equal protection question before this Court, the Texas law is valid. A classification based on age or susceptibility to rehabilitation is reasonable and not suspect, as indicated by the cases cited previously. The Texas legislature has the discretion to recognize, as have other state legislatures and the United States Con-

gress, that youthful offenders should be accorded an opportunity for rehabilitation before patterns of criminal behavior become too ingrained to break. A law subjecting the juvenile to longer confinement or supervision than an adult might receive is within the broad authority of the state to act for the welfare of minors. The statute here in question is applied equally to all juveniles and is clearly not in violation of due process or equal protection of the laws and should be upheld.

The Texas Statute Does Not Violate The Prohibition Against Cruel and Unusual Punishment.

Appellant has contended that the mere fact that a juvenile offender can be subjected to confinement or supervision potentially longer than an adult would be for the same basic offense is cruel and unusual punishment in violation of the Eighth Amendment. This view has been expressly rejected. *Cunningham v. United States,* supra. The cases cited in the preceding section have found the juvenile laws to be reasonable exercises of the authority of the state to provide for the welfare of children, and that finding precludes any argument that the statute in question here establishes a cruel and unusual punishment.

In general the cruel and unusual punishment prohibition is aimed at the type of punishment rather than the duration of sentence and thus affects inhuman and barbarous practices. See 21 Am.Jur.2d 560-566, Criminal Law, Sections 611-615. Since establishing the length of sentences is within the province of the legislature, the general rule is that a sentence within the limits prescribed by law is not cruel and unusual. *Overstreet v. United States,* 367 F.2d 83 (5th Cir., 1966); *Henderson v. Dutton,* 397 F.2d 375 (5th Cir.,

1968); *David v. State,* 453 S.W.2d 172 (Tex.Crim., 1970). A sentence may be excessively disproportionate to the offense, however, and possibly constitute cruel and unusual punishment. *Weems v. United States,* 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910). The *Weems* case cited by Appellant had cruel and unusual aspects other than the length of sentence. The Ninth Circuit has upheld a statute prohibiting a suspended sentence or parole for narcotics offenders against a claim of cruel and unusual punishment, with the court in effect approving longer incarceration for narcotics offenders than would be received by persons receiving equal sentences for offenses for which parole is not prohibited. *Gallego v. United States,* 276 F.2d 914 (9th Cir., 1960).

The Texas statutes involve no cruel or unusual features. Article 2338-1, Sections 13(d) and 13(e), actually protects the minor from civil disabilities imposed on convicted adults. While Appellant has stressed the maximum length of custody, the juvenile laws clearly provide that a youngster can be released on parole or given a discharge prior to age twenty-one and thus may spend only a short time under state control. In addition a minor committed under the juvenile laws for a major crime, such as murder, may receive far shorter confinement than he would receive as an adult.

Various provisions of the Texas statutes concern the disposition of delinquent children. Article 2338-1, Section 13 (cited in this brief and pages 53-55 of the Jurisdictional Statement), empowers the juvenile court to act for the best interests of the child. Article 2338-1, Section 14 (found in the Jurisdictional Statement, pages 58-59), allows modification of judgment.

For those youngsters committed to the Texas Youth Council under the authority of Article 2338-1, Section 13, and the Texas Youth Council Act, Article 5143d, Sections 12 and 13, Texas Civil Statutes (Vernon, 1948), the Youth Council has broad authority to act under Section 17 of Article 5143d as follows:

> "When a child has been committed to the Youth Council as a delinquent child, the Council may:
>
> "(a) Permit him his liberty under supervision and upon such conditions it believes conducive to acceptable behavior; or
>
> "(b) Order his confinement under such conditions as it believes best designed for his welfare and the interests of the public; or
>
> "(c) Order reconfinement or renewed release as often as conditions indicate to be desirable; or
>
> "(d) Revoke or modify any order of the Council affecting a child, except an order of final discharge, as often as conditions indicate to be desirable; or
>
> "(e) Discharge him from control when it is satisfied that such discharge will best serve his welfare and the protection of the public."

The statutes clearly allow flexibility and are designed to promote the welfare of minors. These statutes serve a legitimate purpose and cannot be said to constitute cruel and unusual punishment.

The Case Presents No Substantial Federal Question.

The questions raised on this appeal have been raised in various courts and are not of first impression. Laws relating to minors have been upheld against a variety of constitutional attacks. See the cases cited previously

and 47 Am.Jur.2d 993-995, Juvenile Courts and Delinquent and Dependent Children, Section 13-15.

The Appellee State of Texas has recognized the need to provide guidance and rehabilitative treatment for youths. The state has exercised the broad duty mentioned in the *Prince* and *Ginsberg* cases to promote the welfare of children by establishing the juvenile court system in Article 2338-1. The purpose of the statute is found in Section 1, as follows:

> "The purpose of this Act is to secure for each child under its jurisdiction such care, guidance and control, preferably in his own home, as will serve the child's welfare and the best interest of the state; and when such child is removed from his own family, to secure for him custody, care and discipline as nearly as possible equivalent to that which should have been given him by his parents."

This purpose is amplified by the act creating the Texas Youth Council, Article 5143d, as set out in Section 1:

> "The purpose of this Act is to create a Texas Youth Council to administer the state's correctional facilities for delinquent children, to provide a program of constructive training aimed at rehabilitation and reestablishment in society of children adjudged delinquent by the courts of this state and committed to the Texas Youth Council, and to provide active parole supervision of such delinquent children until officially discharged from custody of the Texas Youth Council. . . ."

In Section 2 of each of the aforementioned statutes, the legislature expressly directed that the statutes be liberally construed to accomplish the purpose indicated. The Texas courts have recognized the need for the

special juvenile laws, and the constitutionality of Article 2338-1 has been upheld. *Dendy v. Wilson,* 142 Tex. 460, 179 S.W.2d 269 (1944). The great need for the protection and rehabilitation of juvenile delinquents justfies the exercise of the broad authority of the state in the manner questioned on this appeal.

The authority of the state as applied in Appellant's particular case is proper and not an abuse of due process or equal protection or a cruel or unusual punishment. A review of the Statement of Facts (hereafter abbreviated S.F.) from Appellant's trial reveals a sequence of events more serious than the breaking of a car window worth $7.88 on February 26, 1969. For no apparent reason, Appellant cursed high school R.O.T.C. students patrolling a parking lot and struck one student in the mouth and kicked another one. Appellant then twice threw a rock at a car window and ran off. When a student gave chase, Appellant threatened the student with a rock (S.F. 10-12, 17-18, 23-26). The judge found Appellant to be delinquent beyond a reasonable doubt (S.F., 34). After finding Appellant to be delinquent, the judge reviewed the minor's case history in order to make a proper disposition of the youngster and noted that Appellant had not been cooperative with juvenile authorities and that he had been referred to juvenile authorities at times from November, 1968, to March, 1969, for burglary (twice), auto theft, and drunkeness and had been suspended from school shortly before the rock-throwing incident because of difficulties with a teacher (S.F., 36-38). While only the events surrounding the breaking of the car window were proved as the basis for adjudging Appellant delinquent, the other factors added clear support for the order committing Appel-

lant to the Texas Youth Council for an indeterminate period not beyond Appellant's twenty-first birthday.

The cases cited in this motion clearly refute the contentions raised by Appellant. The due process and equal protection questions have previously been decided in Appellee's favor in *Smith v. State,* 444 S.W.2d 941 (Tex.Civ.App.-San Antonio, 1969, error ref., n.r.e.) (See Jurisdictional Statement, pages 23-34). In addition this Court very recently refused to review a vagueness challenge to the definition of a delinquent child in Article 2338-1, Section 3. The Court dismissed the appeal for want of jurisdiction and denied the writ of certiorari in *E.S.G. v. The State of Texas,* No. 1471, October Term, 1969 (June 15, 1970), which was an appeal from *E.S.G. v. State,* 447 S.W.2d 225 (Tex.Civ.App.-San Antonio, 1969, error ref., n.r.e.). In denying review this Court in effect recognized the broad power of the state to promote the welfare of children. Appellee urges the Court also to uphold the sections of Article 2338-1 brought forth on this appeal, because the statute on its face and as applied is clearly constitutional.

CONCLUSION AND PRAYER

Appellee respectfully submits that the Jurisdictional Statement of Appellant presents no substantial federal question and that the authorities cited by Appellee manifestly show that the questions raised are so unsubstantial as not to require further argument.

Appellee therefore respectfully moves the Court to dismiss this appeal or in the alternative to affirm the judgment entered in this cause by the Court of

Civil Appeals for the Fourth Supreme Judicial District.

Respectfully submitted,

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CETRIFICATE OF SERVICE

I, Robert C. Flowers, Assistant Attorney General, certify that copies of Appellee's Motion to Dismiss or Affirm have been served on the attorney for Appellant by depositing the copies in the United States Mail, postage prepaid, certified mail, on this ____ day of June, 1970, addressed to Frank P. Christian, Attorney at Law, Bexar County Legal Aid Association, 203 West Nueva Street, San Antonio, Texas 78207.

ROBERT C. FLOWERS
Assistant Attorney General